OFFICE OF GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, Dockets Division

FROM: Associate General Counsel, Litigation Division

SUBJECT: American Personal Communications v. FCC & USA, No. 94-1577, Freeman Engineering Associates, Inc. v. FCC, No. 94-1579, Pacific Bell v. FCC & USA, No. 94-1580 and Cox Enterprises, Inc. v. FCC & USA, No. 94-1589. Filing of three new Petitions for Review and a Notice of Appeal filed in the United States Court of Appeals for the District of Columbia Circuit.

DATE: August 30, 1994

Docket No(s). ET 93-266 and GEN 90-314

File No(s). PP-6, PP-52 and PP-58

This is to advise you that on August 19, 1994, American Personal Communications and Pacific Bell filed a Section 402(a) Petition for Review, that Freeman Engineering Associates, Inc. v. FCC, filed a Section 402(b) Notice of Appeal and that on August 24, 1994, Cox Enterprises, Inc. v. FCC & USA filed a Section 402(a) Petition for Review in the United States Court of Appeals for the District of Columbia Circuit. The FCC underlying decision is: In the Matter of Review of the Pioneer's Preference Rules & In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 94-209, released August 9, 1994.

Petitioners and Appellant, who was awarded a pioneer's preference in the broadband PCS proceeding, challenge the FCC's decision to require pioneer's preference recipients to pay for their broadband PCS licenses. They contend that this payment requirement exceeds the FCC's statutory authority and is unsupported by the record.

Due to a change in the Communications Act, it will not be nessary to notify the parties of this filing.

The Court has docketed these cases as Nos. 94-1577, 94-1579, 94-1580 and 94-1589 and the attorney assigned to handle the litigation of these cases is James Carr.

Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PERSONAL COMMUNICATIONS, Petitioner,	
v.	No. 94 -
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, Respondents.	94-1577

PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

American Personal Communications ("APC"), pursuant to 28 U.S.C. §§ 2342 and 2344; Section 402(a) of the Communications Act, 47 U.S.C. § 402(a); and Rule 15(a) of the Federal Rules of Appellate Procedure, petitions this Court for review of an order of the Federal Communications Commission ("FCC"), entitled Memorandum Opinion and Order on Remand, FCC 94-209, released August 9, 1994, in the proceedings In the Matter of Review of the Pioneer's Preference Rules, ET Docket No. 93-266, and In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, PP-6, PP-52, and PP-58 ("Remand Order"). The Remand Order was published in the Federal Register on August 17, 1994. Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

In the Remand Order, the FCC modified its pioneer's preference rules, 47 C.F.R. § 1.402, to require that persons

receiving pioneer's preferences in proceedings where tentative (but not final) decisions had been reached as of August 10, 1993, will be required to pay for their licenses, with the amount of the payment to be determined on a case-by-case basis.

As to the pioneer's preferences awarded for broadband PCS service, the Commission decided that it would impose, as a condition on the licenses to be issued to the pioneer's preference recipients (like APC), a requirement that they must pay to the United States Treasury an amount equal to either: 1) 90% of the winning bid for the 30 MHz broadband MTA license in the same market as the pioneer's license, as determined in the PCS competitive bidding system held pursuant to Section 309(j) of the Communications Act, 47 U.S.C. § 309(j); or (2) 90% of an adjusted value of the license to be calculated based on the average per population price for the 30 MHz broadband MTA licenses in the top 10 MTAs, again as determined through successful bids in the § 309(j) competitive bidding system. As the basis for its authority to require pioneers to pay for their licenses, the FCC discussed only on Section 4(i) of the Communications Act, 47 U.S.C. § 154(i).

In imposing a requirement that pioneers pay substantial sums to the United States Treasury as a condition of receiving their licenses, the FCC clearly exceeded its statutory authority under the Communications Act, engaged in

retroactive rulemaking, and acted without basis in the record and in an arbitrary, capricious and unlawful manner.

APC requests that the Court rule that the FCC's attempt in the Remand Order to impose a payment condition on pioneers' licenses is unlawful, arbitrary and capricious, not supported by substantial evidence, and otherwise not in accordance with law.

APC previously filed a petition for review of the Remand Order on August 10, 1994, the day after the Commission released the Order. See Petition for Review of an Order of the Federal Communications Commission, in American Personal Communications v. FCC, No. 94-1549 (filed August 10, 1994). Under the Commission's interpretation of its regulations concerning computation of time, August 10 appears to be the first day on which APC could seek judicial review of the Commission's decision to impose a condition on the licenses of particular parties requiring the payment of substantial sums to the U.S. Treasury.[1/] However, as this Court noted in

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[1/] Under 47 U.S.C. § 405(a) and 47 C.F.R. § 4, the time period for seeking judicial review begins on the day after date of "public notice" of an order, which is the publication date in the Federal Register for rulemaking documents, 47 C.F.R. § 1.4(b)(1), and the release date for "non-rulemaking documents," 1.4(b)(2). Under the Commission's interpretation of these regulations (an interpretation held reasonable by this Court in Adams Telcom, Inc. v. FCC, 997 F.2d 955, 956 (D.C. Cir. 1993)), a party is deemed to be seeking review of a "non-rulemaking document" if "the portion" of the order being challenged is not a rulemaking, even if the order arose from a rulemaking docket. Id. at 956-57. Because APC is challenging, inter alia, a portion of the Commission's decision that does not promulgate a rule, but instead orders a

(continued...)

Adams Telcom, Inc. v. FCC, 997 F.2d 955, 957 (D.C. Cir. 1993), there is some ambiguity in those regulations and the Commission's interpretation of them. To protect against the possibility that the Remand Order might be viewed as a rulemaking order (in which case the time for seeking judicial review would begin on the day after the date of publication in the Federal Register), APC is following this Court's suggestion in Western Union Telegraph Co. v. FCC, 773 F.2d 375, 380 (D.C. Cir. 1985), by filing this "protective petition" to supplement its earlier petition and thereby eliminate the need for the Court to address any jurisdictional issues. Because this case and No. 94-1549 will

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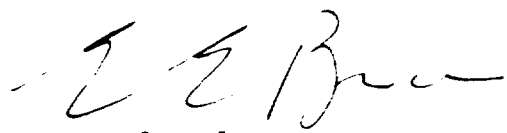
[1/](...continued)
licensing condition to be imposed on the licenses of particular entities, the Commission's interpretation of § 1.4(b)(2) appears to mean that the time to seek judicial review for APC's challenge is measured from the release date. Furthermore, even if the licensing condition set forth in by the Commission's order were considered a rule, it applies only to a readily identifiable class of persons, and the order nowhere specified that it or the licensing condition would be published in the Federal Register. Thus, the release date would also be the appropriate trigger under 47 C.F.R. 1.4(b)(3) for seeking judicial review of a "rule making[] of particular applicability."

thus involve identical parties and identical issues, the two should be consolidated, and a motion for consolidation accompanies this petition.

Respectfully submitted,



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Dated: August 19, 1994

Case FCC 94-209

Aug 19 2 15 PM '94

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Freeman Engineering Associates, Inc., Appellant	)	
v.	)	**Case No.** 94-1579
Federal Communications Commission, Appellee	)	

NOTICE OF APPEAL

Freeman Engineering Associates, Inc. ("Freeman"), by its attorneys and pursuant to Section 402(b)(1) of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. §402(b)(1), hereby appeals the decision of the Federal Communications Commission ("FCC"), as set forth in Third Report and Order (GEN Docket No. 90-314), FCC 93-550, released February 3, 1994 ("Third R&O") (copy attached), insofar as it denied Freeman's request for a pioneer's preference for a license to provide Personal Communications Services ("PCS") in the 2 GHz frequency band (also known as "Broadband PCS").[1] In support hereof, the following is shown:

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[1] The Third R&O was issued in the rulemaking proceeding in GEN Docket No. 90-314, but deals exclusively with the award of three pioneer's preference requests and the denial of 47 others. This Court has jurisdiction over cases brought under both Sections 402(a) and 402(b) of the Act. These provisions of the Act are usually mutually exclusive, but in some cases, as here, the subject matter of the FCC action may arguably be subject to either section of the Act. This notice of appeal is timely-filed in either case. The Court has held that under these circumstances, when no party will be prejudiced thereby, it will treat a notice of appeal filed under Section 402(b) of the Act as a petition for review under Section 402(a) of the Act if Section 402(a) of the Act is found to be applicable. Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1136 n.1 (D.C. Cir. 1976).

1. In the Third R&O, the FCC: a) awarded American Personal Communications, Inc., Cox Enterprises, Inc. and Omnipoint Communications, Inc. pioneer's preferences for Broadband PCS licenses in separate geographic markets; and b) denied the 47 remaining requests for pioneer's preferences (including Freeman's) for Broadband PCS licenses.

2. The procedures for the award of pioneer's preferences are set forth in Section 1.402 of the FCC's Rules, 47 C.F.R. §1.402. Under Section 1.402(d) of the FCC's Rules, 47 C.F.R. §1.402(d), the grant of a pioneer's preference effectively constitutes the grant of a commercial radio station authorization.[2] Thus, the denial of a request for a pioneer's preference effectively constitutes the denial of an application for a construction permit or station license within the meaning of Section 402(b)(1) of the Act.

3. This case has previously been before this Court. On March 4, 1994, Freeman filed a "Notice of Appeal" with this Court to obtain judicial review of the FCC's Third R&O insofar as it denied Freeman's request for a pioneer's preference for a Broadband PCS license. Freeman Engineering Associates, Inc. v. FCC, Case No. 94-1155 (D.C. Cir., filed March 4, 1994) ("Case No. 94-1155").

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[2] 47 C.F.R. §1.402(d) states that "[i]f awarded, the pioneer's preference will provide that the preference applicant's application for a construction permit or license will not be subject to mutually exclusive applications."

Freeman's appeal in Case No. 94-1155 was subsequently consolidated with other pending Broadband PCS appeals under the lead case Pacific Bell v. FCC, Case No. 94-1148 (the "Consolidated Broadband PCS Cases"). On July 8, 1994 and apparently in response to arguments made in the Joint Brief of the Petitioners, the FCC's General Counsel filed a motion with this Court requesting that the Consolidated Broadband PCS Cases be remanded to the Commission to revisit the issue of whether Broadband PCS pioneer's preference grantees should be required to pay for their licenses. By Order dated July 26, 1994, this Court granted the FCC's motion and remanded the Consolidated Broadband PCS Cases in their entirety. By Memorandum Opinion and Order on Remand (ET Docket No. 93-266, GEN Docket No. 90-314), FCC 94-209, released August 9, 1994 ("MO&O on Remand"), the FCC held that Broadband PCS pioneer's preference grantees will be required to pay for their licenses.[3] Thus, the filing of Freeman's instant "Notice of Appeal" is timely.

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[3] In response to this Court's remand, on August 2, 1994, Freeman, Viacom International, Inc., Time Warner Telecommunications, Inc. and Cablevision Systems, Inc. jointly filed with the FCC "Supplemental Comments on Remand of the Joint Petitioners" ("Supplemental Comments"). The Supplemental Comments noted that the Joint Petitioners had "opposed remand of any other issues other than those relating to the payment of fees;" and that the FCC had "indicated [to this Court] that the remand should not be so limited and that the agency should 'have the flexibility on remand to consider any of the issues that were addressed' in the proceedings under review in the consolidated cases." Accordingly, in the Supplemental Comments, the Joint Petitioners urged, among other things, "the [FCC] to consider on remand and resolve the issues raised by Joint Petitioners in Pacific Bell and the consolidated cases concerning the failure of the [FCC] to fully and adequately distinguish those requests for Pioneer's Preferences that were granted and those that were denied." However, the MO&O on Remand is silent on these issues.

4. The FCC's action in the Third R&O denying Freeman's request for a pioneer's preference for a Broadband PCS license was: a) arbitrary, capricious and an abuse of discretion; b) inconsistent with the requirements of 47 C.F.R. §1.402; c) inconsistent with the requirements of Section 309 of the Act; and d) inconsistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §551, et seq.

5. Jurisdiction and venue reside in this Court under Section 402(b) of the Act, 47 U.S.C. §402(b).

6. Freeman requests that the Third R&O be vacated insofar as it denied Freeman's request for a pioneer's preference for a Broadband PCS license, and that the case be remanded to the FCC for further proceedings.

Respectfully submitted,

Freeman Engineering Associates, Inc.

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Dated August 19, 1994

Case

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PACIFIC BELL,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

Case No. 94-1280

PETITION FOR REVIEW

Pacific Bell, pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342 and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, petitions this Court for review of the Memorandum Opinion and Order on Remand of the Federal Communications Commission (the "Commission"), FCC No. 94-209, in the matters of Review of the Pioneer's Preference Rules, ET Docket No. 93-266, and Amendment of the Commission's Rules to Establish New Personal Communications Services, Gen. Docket No. 90-314, PP-6, PP-52 and PP-58 (released August 9, 1994) (the "Remand Order"); a synopsis of the order was published in the Federal Register on August 18, 1994 at 59 Fed. Reg. 42,521. The Commission's Order was issued after this Court remanded the case in Pacific Bell v. FCC, No. 94-1148 (and consolidated

cases), by order of July 26, 1994.[1] Venue is proper under 28 U.S.C. § 2343.

In the Remand Order, the Commission amended its pioneer's preference rules, 47 C.F.R. § 1.402, in light of the Commission's newly granted auction authority. Specifically, the Commission decided that, for parties that had been proposed as tentative preference awardees but did not have final awards at the time auction authority was granted, preference awards would still be granted. Although the licenses selected by the awardees would not be put up for auction, the awardees would not receive their license for free. Instead, the awardees would be required to pay 90 percent of the winning auction bid for the other 30 MHz license in their MTA (Metropolitan Trading Area), or 90 percent of an adjusted value based on the average per population price of the top 10 MTA licenses.[2]

The Commission declined to change its decision with respect to the remaining issues in the Pacific Bell v. FCC case, including: its decision to give broadband preference awards to three parties (American Personal Communications, Cox Enterprises, and Omnipoint Communications, Inc.); its decision denying the preference requests

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[1]The orders under review in that case were Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC No. 93-550, Gen. Docket No. 90-314, 9 FCC Rcd 1337 (1994) (synopsis published at 59 Fed. Reg. 9419 (Feb. 28, 1994)); and Review of the Pioneer's Preference Rules, FCC No. 93-551, ET Docket No. 93-266, 9 FCC Rcd 605 (1994) (synopsis published at 59 Fed. Reg. 8413 (Feb. 22, 1994)).

[2]The three licenses awarded as preferences are ranked numbers 1, 2 and 10.

of other parties, including Pacific Bell; and the decision to award the largest and most important licenses as preferences.[3] The Commission did, however, reject the contention that its prior decisions were tainted by ex parte contacts.

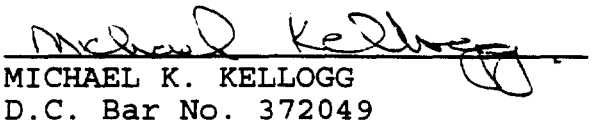
Relief from the Commission's order is sought on the grounds that it is arbitrary, capricious and otherwise contrary to law. Pacific Bell contends, among other things, that the Commission failed to distinguish adequately between those parties that received awards and those that did not; that the licenses awarded as preferences were excessive in size and scope; that the Commission did not adequately consider or explain the pricing mechanism it selected; and that the decision to hold the licenses out of the auction, rather than to give the awardees a bidding credit in the auction, was arbitrary and capricious.

Petitioner therefore requests that this Court hold unlawful, vacate, enjoin, and set aside the Commission's order.

[3]Because the award of a pioneer's preference is not itself the grant of a license, review under 47 U.S.C. § 402(a) is appropriate rather than appeal under 47 U.S.C. § 402(b). If this Court decides otherwise, Pacific Bell requests that this petition for review be construed in part as a timely notice of appeal.

Respectfully submitted,

PACIFIC BELL



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August 19, 1994

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COX ENTERPRISES, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 94-1589

Filed: 8/24/94

PETITION FOR REVIEW

Pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342 and 2344, and Rule 15 of the Federal Rules of Appellate Procedure, Cox Enterprises, Inc. ("Cox") hereby petitions this Court for review of the Memorandum Opinion and Order on Remand of the Federal Communications Commission (the "Commission"), FCC 94-209, released August 9, 1994, in the proceedings In the Matter of Review of the Pioneer's Preference Rules, ET Docket No. 93-266 and In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 ("Remand Order"). The Remand Order was published in the Federal Register on August 18, 1994 at 59 Fed. Reg. 42,521 (Aug. 18, 1994). A copy of this final decision of the agency is attached to this Petition. Venue in this Court is proper under 28 U.S.C. § 2343.

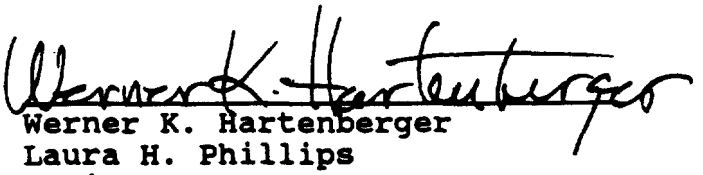
In its Remand Order, the Commission amended its pioneer's preference rules, 47 C.F.R. § 1.402, to require that persons receiving pioneer's preferences in proceedings where

tentative decisions had been reached as of August 10, 1993 will be required to pay for their licenses, with the amount of payment to be determined on a case-by-case basis. As to the pioneer's preferences awarded for broadband personal communications services ("PCS"), including Cox's, the Commission determined to impose, as a condition on the licenses to be issued to the pioneer's preference recipients, a requirement that they must pay to the United States Treasury an amount equal to either: (1) 90% of the winning bid for the 30 MHz broadband MTA license, in the same market as the pioneer's license, as determined in the PCS competitive bidding system held pursuant to Section 309(j) of the Communications Act, 47 U.S.C. § 309(j); or (2) 90% of an adjusted value of the license to be calculated based on the average per population price for the 30 MHz broadband MTA licenses in the top 10 MTAs, again as determined through successful bids in the Section 309(j) competitive bidding system. The Commission based its authority to require pioneers to pay for their licenses solely on Section 4(i) of the Communications Act, 47 U.S.C. § 154(i).

In imposing a requirement that pioneers pay substantial sums to the United States Treasury as a condition of receiving their licenses, the FCC plainly exceeded its statutory authority under the Communications Act, engaged in retroactive rulemaking, and acted without basis in the record and in an arbitrary, capricious and unlawful manner.

Accordingly, Cox requests that the Court rule that the FCC's attempt in the Remand Order to impose a payment condition on pioneers' licenses is unlawful, arbitrary and capricious, not supported by substantial evidence, and otherwise not in accordance with law.

Respectfully submitted,



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Dated: August 24, 1994